# No. 10,387

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

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FRIEDRICH WALTER BERGMANN,
*Appellant,*

vs.

UNITED STATES OF AMERICA,
*Appellee.*

## BRIEF OF NORTHERN CALIFORNIA BRANCH OF THE AMERICAN CIVIL LIBERTIES UNION, AMICUS CURIAE, IN SUPPORT OF APPELLANT.

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### NATURE OF CASE.

This is an appeal from a judgment of a District Court denaturalizing the appellant under a proceeding brought under the Nationality Act of 1940 (8 USCA 738) following findings of fact made after trial that the appellant after being admitted to citizenship was guilty of declarations from which an inference was drawn by the trial court that at the time of naturalization he entertained mental reservations of allegiance to his former sovereign and that, by reason thereof, his oath of allegiance to the United States was false and his certificate of citizenship was fraudulently or illegally obtained.

The principal question involved in the appeal is simply whether or not the naturalized citizen can or cannot exercise fully the constitutional rights guaranteed by the Constitution to the naturalized as well as to the native-born citizen. As an incident thereto there arises the question whether citizenship once granted to an alien is revocable for any reason other than extrinsic fraud practiced in the procurement of a citizenship certificate. A final determination on these questions of law is of great importance not only for the appellant but also for large numbers of those whose citizenship arising from naturalization is endangered by reason of the attack the government has launched upon naturalization certificates.

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## THE TRIAL COURT LACKED JURISDICTION TO ENTERTAIN THE SUIT.

### Affidavit Showing Good Cause Is Prerequisite to Maintenance of Suit.

The complaint is defective and ought to have been dismissed because the plaintiff instituted the action without first presenting to the court below *"an affidavit showing good cause therefor"* pursuant to the provisions of 8 USCA 738(a). A similar requirement previously existed under Section 15 of the Act of 1906. (8 USCA 405.) A conflict of authority appears to exist in the Circuits upon this point, however. In *U. S. v. Salomon,* 231 Fed. 928 (CCA-5), a denaturalization proceeding commenced prior to 1906 in which such an affidavit had not been presented to the court, an action was dismissed upon the ground that the

affidavit was a mandatory jurisdictional condition precedent to the right to bring such a suit. In *Schwinn v. U. S.,* 112 Fed. (2d) 74, which was decided under the Act of 1906, this court expressed an opinion that such an affidavit "is not jurisdictional". The expression evinces a willingness to nullify a requirement that fell within the constitutional power of Congress to impose as a jurisdictional prerequisite to the bringing of a suit. Inasmuch as Congress acted within its sphere in making the filing of a suit dependent upon the satisfaction of the condition precedent the declaration of the court appears to be the product of error. The courts are authorized neither to ignore conditions which Congress may impose within its constitutional powers nor to nullify or refine away its legislative power by judicial interpretation. If Congress is prohibited by Art. III of the Constitution from invading the judicial field the courts are similarly prohibited by Art. I from invading the legislative field.

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## THE COMPLAINT FAILS TO STATE GROUNDS FOR EQUITABLE RELIEF.

**No Facts of Fraud Are Alleged.**

The complaint fails to state grounds for equitable relief for the reasons it is utterly lacking in averments of fact showing *when* and *how* and the *circumstances* under which plaintiff made the discovery of the fraud asserted and is utterly lacking in averments of the factual circumstances constituting the fraud. See Rule 9b of the *Rules of Federal Procedure* which re-

quires that *"the circumstances constituting fraud or mistake shall be stated with particularity"*. The complaint is also utterly lacking in averments of fact showing why the discovery of the alleged fraud was not sooner made. The rule is that it is necessary *"to plead affirmatively facts excusing failure to make an earlier discovery of the circumstances of the fraud relied upon"*. (12 *Cal. Juris.* 806-807.) In the leading case of *Lataillade v. Orena,* 91 Cal. 565 at 578, the rule was established that in order to state a cause of action a party relying on fraud,

> "must show that he used due diligence to detect it, and if he made any particular discovery, should state when it was made, what it was, how it was made, and why it was not made sooner; and further, that one will be presumed to have known whatever with reasonable diligence he might have ascertained concerning the fraud of which he complains."

In accord:

*Del Campo v. Camarillo,* 154 Cal. 647, 657;
*Lady Washington C. Co. v. Wood,* 113 Cal. 482;
*Wood v. Carpenter,* 100 U.S. 140.

See, also,

4 *Cal. Juris.* 793, Sec. 26.

**The Suit Is Not Maintainable Under the Nationality Act of 1940.**

The Nationality Act of 1940 contains many entirely new provisions and the portion of the subject matter dealt with in the prior naturalization statutes which it incorporates in a greatly altered and revised form is cast in different molds. Its enactment, therefore,

repealed *in toto* the former statutes relating to naturalization. The rules enunciating this are set forth as follows:

> "Where a later act covers the whole subject of earlier acts, embraces new provisions, and plainly shows that it was intended, not only as a substitute for the earlier acts, but to cover the whole subject then considered by the legislation, and to prescribe the only rules in respect thereto, it operates as a repeal of all former statutes relating to such subject matter. The rule applies not only where the former acts are inconsistent or in conflict with the new act but also even where the former acts are not necessarily repugnant in express terms, or in all respects, to the new act. In order to effect a repeal by implication on this ground it must appear that the subsequent statute covered the whole subject matter of the former one, and was intended as a substitute for it."
>
> 59 *Corpus Juris* 919, Sec. 520.

> "A subsequent statute, revising the whole subject matter of a former one, and evidently intended as a substitute for it, although it contains no express words to that effect, must operate to repeal the former to the extent to which its provisions are revised and supplanted. This is true even though the subsequent statute contains no express words of repeal and is not repugnant to the former statute."
>
> 59 *Corpus Juris* 921-922, Sec. 521.

The present suit was commenced under the provisions of Section 338 of the Nationality Act of 1940. (8 USCA 738.) The misrepresentations alleged there-

in, if true, occurred prior to the passage of this Act when the procedural provisions of 8 USCA 405 governed but which are now obsolete. Consequently, the suit is barred by the fact that the statute under which it might have been brought has been repealed and the present statute cannot be applied so as to punish the appellant for acts or declarations prior to 1940 or to deprive him of precious constitutional rights of citizenship which accrued to him prior thereto. *Ex post facto* and *retroactive laws* are forbidden by Section 9 of Art. I of the Constitution. This prohibition would appear to apply to matters of a quasi-criminal nature such as denaturalization suits and to *retrospective laws* where constitutional rights, namely, the rights of citizenship and citizenship itself are affected in civil actions.

**Naturalization Judgments Succumb to Attacks on Jurisdictional Grounds For Extrinsic But Not Intrinsic Fraud.**

The complaint contains neither general nor specific allegations of any facts constituting *extrinsic fraud* which would justify equitable relief. It contains nothing but general allegations of misrepresentations of factual matters of a non-jurisdictional nature which, if true, constitute nothing but *intrinsic fraud* from which equity is not empowered to grant relief. The rule has long been settled that false testimony, misrepresentation of material facts or the suppression of the truth which involve only matters of a non-jurisdictional nature *do not operate to deprive a court of jurisdiction.* They do not constitute *extrinsic fraud* which vitiates a judgment but *intrinsic*

*fraud* from which no relief can be granted when the judgment has once become final.

*U. S. v. Throckmorton,* 98 U.S. 61, 25 L. Ed. 93, *establishing federal rule;*

*Pico v. Cohn,* 91 Cal. 129, *establishing rule in California.*

The complaint alleges that the appellant's fraud consisted of misrepresentations of facts of a non-jurisdictional nature. The proof adduced in support of the allegations at the trial below, construed most strongly against him and without benefit of the "clear, unequivocal, and convincing" evidence rule, demonstrates that the fraud and illegality consisted simply of post-naturalization declarations. Were these at all admissible in evidence they tended to prove nothing but misrepresentations of non-jurisdictional facts and, consequently, their utterance, at most, constituted intrinsic fraud. The complaint, therefore, failed to state a cause of action and the evidence failed to establish a cause of action for any relief whatever.

Attention is also drawn to the fact that at the naturalization proceeding the appellee was present in the persons of its duly constituted representatives, the naturalization examiner and his attorney, and had an opportunity to question the appellant and his witnesses and to expose any fraud that may have been practiced. It was guilty of *laches* and is chargeable with *negligence* in failing to have exposed the non-jurisdictional misrepresentations, if any, of which it now complains some six years later. Having failed

so to do it is *estopped* from attacking the validity and finality of the naturalizing decree and the matter is *res judicata.* A like estoppel arises from the fact that the naturalization examiner, as the agent of the government, submitted to the naturalizing court prior to the final hearing on the appellant's petition for citizenship the government's own favorable recommendation that the petition be granted. The defenses of laches, waiver and estoppel have been declared to be unavailable in denaturalization suits. See *U. S. v. Ovens,* 13 Fed. (2d) 376 and *U. S. v. Richman,* 17 Fed. (2d) 28, as examples. These opinions, however, appear confused in that they regard fraud and illegality as being extrinsic and not intrinsic matters because of their mistaken view that all issues involved in naturalization proceedings are jurisdictional prerequisites. The defenses are not available in cases involving extrinsic fraud because a judgment obtained by such means is not a judgment at all but a nullity for the reason that where such fraud is practiced the naturalizing court does not have power to naturalize for want of satisfaction of the jurisdictional prerequisites to naturalization. The defenses would seem to be available in all cases involving mere intrinsic fraud which never deprives the court of jurisdiction. If the government steps down from its lofty perch to enter the arena of equity it automatically submits to be bound by the ordinary rules of equity on a like footing as any private litigant.

The provisions of 8 USCA 738 provide for revocation of naturalization "on the ground of fraud or on

the ground that such order and certificate of naturalization were illegally procured". In *Schneiderman v. U. S.,* 87 L. Ed. 1249, the court devoted discussion to the difference between the meaning of fraudulent procurement and illegal procurement without shedding much light on the matter. The distinction between the two, if any was intended by Congress, is that the former involves the question of tortious or criminal intent on the part of an applicant in misrepresenting or suppressing jurisdictional prerequisites whereas the latter, being a more comprehensive expression, includes, in addition thereto, simple accident or error as to jurisdictional prerequisites whereby naturalization is mistakenly obtained. The appellee has neither stated nor proved a cause of action for fraud or illegality.

**Jurisdictional Prerequisites to Nationalization.**

The questions whether or not an applicant renounces his former allegiance, is attached to the principles of the Constitution and has behaved as a person so attached for the statutory period are all questions of fact to be determined in a final hearing on a petition for citizenship. They are placed in issue at the hearing. The evidence adduced in support of these issues is considered and weighed by the naturalizing court. The findings and recommendations of the naturalization examiner are factual matters of an evidentiary nature which are also given weight by the naturalizing court. These are issues of fact upon which the finding of the court is final and conclusive in the absence of an abuse of legal discretion.

These issues are of a non-jurisdictional nature. They do not constitute jurisdictional prerequisites the want of which deprives the court of jurisdiction to naturalize.

Where one who has not resided within the United States for the required five-year period is erroneously or fraudulently admitted to citizenship the decree of naturalization is void because the court wants jurisdiction to entertain the suit and is without jurisdiction to naturalize. Misrepresentations by an applicant or his witnesses that the applicant has resided here for the required period constitutes *extrinsic fraud* on the court because such give it a spurious jurisdiction. The residential requirement imposed by the statute is a jurisdictional prerequisite and the fraud practiced is one by means of which a court is induced to exercise a jurisdiction that is utterly wanting, which it has never gained and is not empowered to exercise. See *Johannessen v. U. S.,* 225 U.S. 326, 32 S. Ct. 614 (decided May 27, 1912), and *Schwinn v. U. S.,* 112 Fed. (2d) 74. See, also, *U. S. v. Ginsberg,* 243 U.S. 474, 37 S. Ct. 422, where a judgment was also declared void for the additional reason that it was rendered by a pro tem judge in chambers. This failed to satisfy the jurisdictional condition precedent required by the statute that the hearing be held "in open court" for want of which the court was without jurisdiction to render a judgment.

A similar conclusion was reached in *U. S. v. Van Ness,* 245 U.S. 319, 38 S. Ct. 118, where the filing of a certificate of arrival of an alien, then required by

statute to be filed with the petition for citizenship, was declared to be a jurisdictional prerequisite to naturalization and not a mere form of proof to be introduced in evidence in the proceeding. The court recognized the distinction between what may be termed fraudulent misrepresentations as to jurisdictional prerequisites to the right to citizenship and fraudulent misrepresentations of mere evidentiary matters of a non-jurisdictional nature which are placed in issue in such proceedings. Misrepresentations of the former type constitute *extrinsic fraud* upon the court and vitiate the judgment whereas misrepresentations of the latter type constitute *intrinsic fraud* and the judgment is safe from attack. It recites:

> "A decision on such minor questions (competency or weight of evidence or credibility of witnesses, or mere irregularities in procedure), at least of a state court of naturalization, is, though clearly erroneous, conclusive even as against the United States if it entered an appearance under Sec. 11."

The same conclusion was reached in *Maney v. U. S.*, 278 U.S. 17, 49 S. Ct. 15, where the filing of such a certificate of arrival at the time the petition for naturalization was filed was held to be a condition precedent necessary to vest the court with jurisdiction to naturalize. It was declared therein that the filing thereof *nunc pro tunc* would not cure the jurisdictional defect and, consequently, the court was without jurisdiction and its judgment a nullity and not res judicata.

In the *Johannessen* case the Supreme Court suggested that Congress may "authorize a direct attack upon certificates of citizenship in an independent proceeding such as is authorized by Sec. 15 of the Act of 1906" under the theory that the original naturalization proceeding (held in 1912 or prior thereto) was not *"an adversary proceeding"* inasmuch as the applicant was *"not required to make the government a party nor to give any notice to its representatives"*. The record in the case disclosed that Johannessen appeared *"before one of the courts designated by law for the purpose, and without notice to the government, and without opportunity to appear, submitting his application for naturalization with ex parte proofs in support thereof, and thus procuring a certificate of citizenship."* It is significant the case was decided in 1912 *when no preliminary hearings were provided.* In 1926 Title 8 USCA, Sec. 399a was enacted, consequently from 1926 until the Nationality Act of 1940 (8 USCA 733) became effective, pursuant to *authority delegated by the courts* a *"preliminary hearing"* of an applicant was conducted by a government examiner whose *"findings and recommendations"* were submitted to the court under 8 USCA 399a(b). Naturalization proceedings prior to 1926, therefore, were not adversary ones. *From 1926 to 1940 the proceedings were adversary ones.* When the *Johannessen* case was decided naturalization proceedings were *summary* and *ex parte* and *no notice was required* to be given to the government. But from 1926 to 1940 the government conducted hearings and made recommendations to

the court under 8 USCA 399a(b), hence the naturalization proceeding in which the appellant received citizenship in 1937 was an "adversary proceeding". In the *Johannessen* case it is to be noted the government had no notice of the hearing in the naturalizing court for the decision recites that the government *then, in 1912,* had no opportunity "to appear * * * for the purpose of cross-examining the petitioner and the witnesses * * * to call witnesses, produce evidence, and be heard in opposition to the granting of * * * the petition" which was then a mere *optional right* conferred upon the government by 8 USCA 399 but for which no notice was provided for or required to be given to the government in order to put it on notice as to the pendency of the hearing. (These sections have been repealed by the Nationality Act of 1940. Section 733 of Title 8 USCA now makes it a *mandatory duty* of the Commissioner of Immigration and Naturalization to hold preliminary hearings of applicants for citizenship, to make findings and submit recommendations thereon to the court. He *"must make recommendations to grant, or deny petitions or to continue cases"*. All naturalization proceedings henceforth must be classified as adversary proceedings.)

Between 1926 and 1940, therefore, whenever the government conducted a preliminary hearing of an applicant, made findings and submitted its recommendations to a court or appeared at the final hearings on the petition and contested the petition or failed to contest it the government was either a *party*

or a *privy* to the proceeding and the proceeding became "an adversary proceeding".

**Appellant Was Naturalized at an Adversary Judicial Hearing.**

The record herein demonstrates that the government in 1936 conducted a preliminary hearing and examination of the appellant (R. 222); that the naturalization examiners made their findings and submitted their recommendations to the naturalizing court (R. 231-232), and that the court, on April 9, 1937, at an open session, conducted the *final hearing* on the petition for citizenship pursuant to the mandate of 8 USCA 398. It is to be presumed that the naturalizing court performed its duty in subjecting the applicant to an examination on the merits of his petition. No inference to the contrary is to be drawn. These hearings are neither farcical nor perfunctory but are typical judicial hearings. The hearing is presided over by the judicial servant of the government. The government is a party or privy to the hearing and is present also in the person of the naturalization examiner and the government attorney attached to the office of the Commissioner of Immigration and Naturalization. The failure of the government to contest the petition when it has both notice and knowledge of the time and place of hearing, and is present thereat in the persons of its proper representatives who are offered ample apportunity to contest it and who are charged with the duty of safeguarding the government's interest does not convert the hearing into an *ex parte* one. Any conclusion to the contrary would be tantamount to an accusation that the gov-

ernment's own agents, examiners and naturalizing court, were derelict in their duties.

Original jurisdiction to naturalize aliens is conferred upon *federal district courts* and also upon *state courts of record* by the Nationality Act of 1940 (8 USCA 701) and formerly by 8 USCA 357. A state court does not function as a federal court and is not an agency of a federal court in naturalization proceedings. *In re Fordiani,* 98 Conn. 435, 120 A. 338, 339; 3 *Corpus Juris Secundum* 842, Sec. 134. In naturalization proceedings commenced in state courts the adjective law of the state, procedural and appellate, govern and those of the federal jurisdiction have no application. *Tutun v. U. S.,* 270 U.S. 568, 46 S. Ct. 425. See, also, *In re Bogunovich,* 18 Cal. (2d) 160, overruling prior California decisions and adopting rule of *Tutun* case. A proceeding in a federal court, therefore, to set aside a judgment of a state court would be a collateral attack upon the judgment of a court of a different sovereign jurisdiction and consequently impermissible. *U. S. v. Gleason,* 78 Fed. 396. A denaturalization suit brought under the Nationality Act of 1940 is an independent proceeding which may be commenced in a federal court to set aside a naturalizing decree granted either by a state court or a federal court which may not have been the naturalizing court but a co-ordinate court, consequently, the attack is in reality a collateral and not a direct attack. It appears beyond doubt that Congress cannot be empowered by statute to set aside naturalization decrees granted by competent state courts. Judgments of state courts are entitled to

"full faith and credit" in the federal courts under Section 1 of Art. IV of the Constitution. *Covington v. Covington Bank,* 198 U.S. 100, 25 S. Ct. 562; see, also, 34 *Corpus Juris* 1157, Sec. 1639(2), and cases there cited. Such judgments are final and conclusive "between the *parties* and *privies* to the judgment". *Englehard v. Schroeder,* 278 Fed. 341, affirm. 258 U.S. 610, 42 S. Ct. 382; *Privett v. U. S.,* 261 Fed. 351, affirm. 256 U.S. 201, 41 S. Ct. 455; and 34 *Corpus Juris* 1158, Sec. 1640(b) and cases there cited. It also appears beyond doubt that Congress is not empowered to set aside final judgments granted by federal courts for finality of court judgments is an incident to judicial power which is lodged in courts and not in Congress. It is settled that naturalization decrees are not subject to collateral attack. *Spratt v. Spratt,* 4 Pet. 393, 404, 7 L. Ed. 897, 902; *Campbell v. Gordon,* 6 Cranch 176, 3 L. Ed. 190; and *Ex parte Cregg,* 2 Cur. 98, Fed. Cas. No. 3380. If the *due process* of law guaranteed by the 5th Amendment has any significance it certainly includes the processes whereby citizenship is gained in a judicial hearing and attaches finality to the grant thereof. It prohibits Congress from authorizing successive attacks upon the validity of citizenship certificates at the whim and caprice of government officials.

A naturalizing decree is a "final decision" within the purview of 28 USCA 225(a) from which an appeal may be taken either by the government or by the applicant. *Tutun v. U. S.,* 270 U.S. 568, 46 S. Ct. 425. The government having failed to contest the petition of the appellant, to move for a new trial or to

vacate the judgment or to initiate an appeal therefrom within the proper time the judgment became final and conclusive and the matter *res judicata.* The judgment is not, therefore, subject either to direct or collateral attack except for extrinsic fraud and the remedy for fraud of this nature does not find its origin in a congressional statute but arises as an incident to judicial power which is vested in the courts by the Constitution. This type of fraud may be defined as fraud practiced by an applicant upon a court whereby the court assumes a jurisdiction to naturalize which it was not empowered to exercise and would not have except for the jurisdictional fraud perpetrated by the applicant or his witnesses. The naturalizing proceeding involved herein satisfied all the elements of an adversary proceeding for the government was a *party or privy* thereto. The appellant had resided in the United States for the required statutory period consequently the court had jurisdiction to naturalize. No extrinsic fraud was practiced upon that court. *The government has not alleged, contended or proved that the court was without jurisdiction or that it had lost jurisdiction to render the judgment it rendered.* It merely alleges in the complaint that misrepresentations of a factual but nonjurisdictional nature were made. These matters were actually put in issue and were resolved against the government and in favor of the appellant by the naturalizing court in the examination it conducted in accordance with the duty placed upon that court by the provisions of 8 USCA 398. The complaint alleges nothing but intrinsic fraud against which

equity cannot relieve. Had the appellant not possessed the required statutory residential qualifications for citizenship the judgment would have been a nullity whether the record disclosed mere error or false testimony on the length of residence for either would have deprived the court of jurisdiction inasmuch as the five-year residential requirement is a jurisdictional condition precedent which is essential in order to vest in the court the power to naturalize. It is significant that the complaint does not allege that any misrepresentations of a jurisdictional nature were made.

**Rule in Pandit Case.**

Where the government appears in a naturalization proceeding, whether it contests a petition for naturalization or fails to do so, the judgment or decree admitting an applicant to citizenship is an *adversary proceeding* and, if there is no jurisdictional defect as to the length of the applicant's residence in the United States arising from misrepresentations constituting extrinsic fraud, the judgment is final and conclusive and the matter is *res judicata.* Such is the express ruling in *U. S. v. Sakharam Ganesh Pandit,* 15 Fed. (2d) 285, decided by this court on November 11, 1926, where the government attempted in a proceeding brought under Section 15 of the Naturalization Act of 1906, 8 USCA 405, to denaturalize the appellee. The suit was dismissed by this court for the reason that the government having appeared in the naturalizing proceeding and contested the application the judgment granting the certificate was

*"a final judgment"* and the matter was *"res judicata"*. The government applied for certiorari but on March 27, 1927, the Supreme Court denied the application for a writ of certiorari. (See, 273 U.S. 759, 71 L. Ed. 878, 47 S. Ct. 473.)

**The Schneiderman Case.**

It is also significant that in the majority opinion of the Supreme Court in *Schneiderman v. U. S.*, 318 U.S., 87 L. Ed. 1249, *"the record"* did not reveal *"the circumstances under which"* Schneiderman *"was naturalized except that it took place in open court"*, or *whether or not the Government exercised its right to appear and to appeal"*. The special affirmative defense of *res judicata* apparently was not interposed by the defendant therein and, consequently, was not passed upon although this issue might have been considered and have been passed upon, had it been urged, as a reason why the complaint failed to state a cause of action and the court lacked jurisdiction to entertain the action. The concurring opinion of Justice Rutledge suggests, however, that a decree of a naturalizing court finalizes the matter and that it is *res judicata.* The concurring opinion of Justice Douglas also suggests the decree to be *res judicata* for it recites "the judgment of naturalization is final and conclusive except for fraud", that is, extrinsic fraud, *the type of fraud which deprives a court of jurisdiction* as defined in *U. S. v. Throckmorton,* 98 U.S. 61. In the majority opinion the question of *res judicata* was not discussed directly inasmuch as this de-

fense either was not pleaded or urged or was unnecessary to a decision.

The majority opinion in the *Schneiderman* case indicates quite clearly, however, that in a denaturalization suit the court is limited in the scope of its inquiry. It recites that *"he had not been arrested or subject to censure prior to 1927"* (the time of his naturalization); in discussing the application of *"the statutory requirement of attachment correctly to the proof adduced"* recites that the criterion is *"behavior for a period of five years"* preceding the naturalization date, and *"since the immediate problem is the determination with certainty of petitioner's beliefs* from 1922 to 1927 (the naturalization date), *events and writings since that time have little relevance"*. The opinion declares also *"This is the first case to come before us in which the Government has sought to set aside a decree of naturalization years after it was granted on a charge that the finding of attachment was erroneous."* It is to be inferred, therefore, that the Supreme Court entertains very serious doubts whether a judgment of a naturalizing court which has become final is subject to attack for any reason whatsoever except for extrinsic fraud. There would appear to be no doubt, in view of its expression on the scope of its own inquiry into the facts of the case, that *evidence of acts and declarations occurring after the decree of naturalization has become final is valueless and inadmissible.* The court below, therefore, erred in attaching significance and giving weight to the disputed acts and declarations

of the appellant occurring after his admission to citizenship.

**The Denaturalization Statute Is Void as an Interference With Judicial Power.**

Congress is authorized by Section 8, cl. 4 of Art. I of the Constitution to "establish an uniform Rule of Naturalization" and has done so in prescribing the naturalization laws. When a naturalizing court solemnly confers citizenship upon an applicant its original authority is derived from the naturalization acts of Congress but its own action is a valid expression of its own judicial power. The finality which attaches to such a judgment flows from the grant of judicial power the courts derive from Article III of the Constitution. Congress is neither empowered to interfere with nor to destroy the finality of such judgments for such would constitute the exercise of judicial power which is vested exclusively in the courts. Section 338 of the Nationality Act of 1940 (8 USCA 738), upon which the complaint herein is based, and its predecessor statute, 8 USCA 405, would appear, therefore, to be void as unconstitutional interferences with judicial power if they are applied to intrinsic fraud cases. They are also void as to extrinsic fraud cases for the power to set aside judgments for extrinsic fraud is a power inherent in courts without sanction of Congress for it is an incident to judicial power. In the *Schneiderman* case the question whether Congress *"can constitutionally attach to the exercise of judicial power"* authority to re-examine a judgment in a naturalization proceeding which has

become final was propounded by the majority opinion but was left undecided either as not having been raised or urged or as being immaterial. There would seem to be little doubt that Congress possesses no such power for were it authorized so to do the courts would become mere appendages to Congress, judicial power would be destroyed and tripartite constitutional government would cease to be a reality.

**The Judgment Below Violates the Freedom of Speech Guaranty.**

The opinion of the court below appears to violate the "clear, unequivocal, and convincing" evidence rule which, in light of the *Schneiderman* decision, is a rule of substantive law rather than a mere rule of evidence. It appears also to have been based upon the erroneous impression that declarations of the appellant made since his naturalization reflect a state of mind that may have existed at the time of naturalization and might indicate a mental reservation of allegiance to his former country. To give evidentiary weight to the untested theory that recent declarations reflect a pre-existing state of mind is irrational. It rules out of consideration the fact that one's views are dynamic and variable. It is a species of complicated illogic that would impute matters of opinion to a person retroactively. Carried to its extreme it means that one's opinions twenty years hence may be imputed to him now, *nunc pro tunc*. The theory is unworthy of any evidentiary weight. It would render the citizenship of the naturalized a thing of doubt and impermanence. A grant of citizenship is not conditioned upon the continuance of a

static state of mind upon political theory. The naturalized citizen is entitled to enjoy all the rights of the "natural born citizen" except that of eligibility to office of President which is denied by Section 1, cl. 5 of Art. II of the Constitution. *Luria v. U. S.,* 231 U. S. 9. It cannot be doubted that aliens and citizens alike are entitled to enjoy the full measure of freedom of expression guaranteed by the 1st Amendment without penalties so long as they do not transgress the clear and present danger rule. *Bridges v. California,* 314 U.S. 252, 86 L. Ed. 149. It is difficult to conceive, therefore, why the political and other expressions of a naturalized citizen uttered after his admission to citizenship, however unpleasant and unpopular the expressions might be, should fetch a penalty from which the native-born citizen is immune.

Upon being admitted to citizenship the Constitution extended to the appellant the "freedom of speech" and expression guaranteed by the 1st Amendment to the native born. His declarations did not transgress the *clear and present danger* test first formulated by Justice Holmes in his dissent in *Gitlow v. New York,* 268 U.S. 652, which became a rule of law in *Schenck v. U. S.,* 249 U.S. 47, consequently, he is immune from punishment and penalty for his utterances on the same basis as the citizen by birth. Had he been guilty of declarations violative of the clear and present danger rule he could have been charged with sedition, treason or other crime and upon a conviction therefor been subjected to an appropriate punishment and a consequent loss of civil

rights. These safeguards adequately preserve us from wrongdoing on the part of naturalized citizens without the addition of denaturalization which thrusts them into the category of "limited citizenship", a tentative and tenuous thing which would forever distinguish them from citizens by birth. The notion of classes of citizens is repugnant to American juristic reasoning and in conflict with the theory of equality which pervades our Constitution. It would indeed be strange that the naturalized citizen might be penalized for declarations that are permissible and even encouraged among the native born.

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**CONCLUSION.**

Denaturalization suits are rare in peacetime and common in wartime. Sight ought not to be lost of the fact that except for the existence of the world conflict denaturalization suits on the numerical scale we are now witnessing in the district courts would not have been instituted. This type of terror has been loosed upon a large number of our foreign-born citizens who have failed to conform to the standards of thought and expression we would subsequently impose upon them. Apparently we must always wait until a war breaks out rendering their views and expressions unpopular before taking action against them. These suits are punishing actions of a *nunc pro tunc* nature. The objective is to deprive them of citizenship, cast them into concentration camps and, when the opportunity arises, deport them to Germany or Nazi-controlled

countries where they will be imprisoned for having renounced allegiance to Germany in taking oaths of allegiance to the United States. The belated filing of these actions indicates either a previous apathetic attitude upon the part of the government officials charged with the duty of naturalization or, if merit attaches to the charges contained therein, inexcusable negligence upon their part in failing to prevent unworthy and undeserving applicants from receiving certificates of citizenship. It is peculiar that the greater number of these suits are not directed against those who, with justification, may be said to be the big malefactors but against those who must be classified as the insignificant. Paradoxical as it may appear government agents and servants whom we have been wont to regard as tribunes of the people seem to have become the instruments if not the creatures of oppression. The denaturalization of the insignificant offender is a penalty disproportioned to the offense.

There are no degrees of citizenship. Naturalization confers upon the foreign-born citizen all those rights, privileges and immunities which inhere in the native-born citizen. If grants of citizenship to the foreign-born can be set aside for reasons other than extrinsic fraud their citizenship is provisional, insubstantial and unreal and that of the native-born is insecure and fleeting. The creation of classes of citizens and degrees of citizenships would be a denial of legal equality and would undermine constitutional government. In the absence of extrinsic fraud citizenship once gained

cannot be lost except by one of the specific methods prescribed by the Expatriation Statute. See 8 USCA 8 to 15 under the former acts and 8 USCA 800, 801, 804 and 808 prescribing the only methods by which nationality may now be lost. Denaturalization is neither a remedy for intrinsic fraud nor a substitute for expatriation. No jurisdictional error occurred and no extrinsic fraud was practiced in the naturalizing court consequently the grant of citizenship to the appellant was final and conclusive and is free from attack.

It is respectfully submitted that the judgment of the court below should be reversed.

Dated, San Francisco,
October 20, 1943.

Wayne M. Collins,
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